STATE OF MICHIGAN

COURT OF APPEALS

MARK FOX and ANITA FOX,

Plaintiffs-Appellants,

v

SHERWIN-WILLIAMS COMPANY,

Defendant-Appellee.

UNPUBLISHED
January 7, 2010

No. 287999
Ingham Circuit Court
LC No. 07-001630-AV

Before: Talbot, P.J., and O'Connell and Davis, JJ.

Talbot, P.J. (*concurring in part, dissenting in part*).

I concur with the majority's opinion affirming: (a) the dismissal of plaintiffs' claims pursuant to the Michigan Consumer Protection Act, (b) the refusal to impose sanctions for violation of MCR 2.403(N)(4), (c) refusal of the trial judge to recuse herself and (d) the exclusion of evidence. However, I respectfully dissent because I would also affirm the dismissal of plaintiffs' breach of warranty claims and the imposition and amount of case evaluation sanctions.

I. Factual and Procedural History

Plaintiffs hired a contractor, Gerard Davis, to refinish the wood deck affixed to their residence in the spring of 2005. Davis acknowledged that while he had built and stained new decks, he had no previous experience with stripping and resealing a deck. In 2005 the deck was in good condition and was last sealed in 2000, using Cuprinol, which was sold by defendant, Sherwin-Williams. Based on plaintiffs' satisfaction with the results using Cuprinol, when it came time to reseal the deck they instructed Davis to use the same product and provided him the Cuprinol brochure they obtained in 2000.

Davis went to a local Sherwin-Williams store and met with the manager, Rick Brokaw, showing him the brochure and indicating he wanted the Cuprinol product. Brokaw informed Davis that Cuprinol was a discontinued product, but that another product identified as DeckScapes comprised the same formulation. Davis returned to plaintiffs with a DeckScapes brochure to seek their approval for the purchase. Davis returned to defendant's store to obtain additional reassurances that the substitute product was the same as Cuprinol and upon being told they were identical was authorized by plaintiffs to use the new product. Consequently, Davis purchased five gallons of defendant's DeckScapes Waterborne Clear Stain (A15T260). A

conversion chart developed by defendant indicates that this product is the crossover or replacement product for Cuprinol.

With the assistance of two other individuals, Davis stripped and power washed plaintiffs' deck. Due to rain, there was a delay in applying the stain. When staining was initiated, plaintiffs determined they did not like the color and Davis returned the original five gallons to the store and purchased five gallons of DeckScapes Exterior Waterborne Semi-Transparent Deck Stain (A15T15). This is the product that was applied to the deck, but it is not designated as a cross over product for Cuprinol on defendant's conversion chart. Davis acknowledged that the day the deck was stained was hot and that he did not check the surface temperature of the deck before applying or completing the staining, even though the product manufacturer recommends a certain temperature range for best results. It was first revealed at trial that Davis did not do the majority of the deck staining. Rather, a subcontractor for Davis stained approximately 85 to 90 percent of the deck and Davis was not present the majority of the time.

Plaintiffs contend they relied exclusively on the expertise of defendant's employees in selecting the product to be used and its similarity to Cuprinol. It is implied that defendant's employees indicated that the DeckScapes product line was interchangeable with Cuprinol, when in fact only certain versions such as the DeckScapes Waterborne Clear Stain (A15T260), is designated as a crossover or replacement product. Specifically, plaintiffs assert that defendant's employee circled the DeckScapes Exterior Waterborne Semi-Transparent Deck Stain (A15T15) on a brochure procured by Davis when initially seeking a recommendation for a stain to use on plaintiffs' deck. However, the conversion chart shows this product is specifically designated to be new technology and not a crossover product for Cuprinol.

Once snow and ice thawed in the spring of 2006, plaintiffs observed the stain peeling off areas of the deck and some of the deck boards evidenced cracking and separation. Plaintiffs had Davis view the deck and he returned to defendant's store and spoke with Rob Bell regarding the problem. Reportedly, Bell indicated to Davis that several of defendant's customers, including Bell's own family, experienced problems with the DeckScapes product and that they were now recommending the use of a primer with the product. Despite misgivings, plaintiffs permitted Bell to take samples from the deck to send into their laboratory for testing, but plaintiffs did not seek or procure their own testing of the product or deck. Defendant's laboratory testing results indicated that their product did not fail but that the problem was caused by delamination of the deck wood. Although plaintiffs did not undertake to repair the deck, they did procure an estimate of repair from Michael McDaniel of Deck Doctors who estimated a cost of $4,500 for replacing the deck boards and an additional cost of $125 to seal the wood.

Plaintiffs initiated this action in the 54-A District Court, claiming breach of implied warranty, breach of express warranty and violation of the Michigan Consumer Protection Act. All of the judges in the district recused themselves and Judge Theresa Brennan of the 53rd District Court in Livingston County accepted the assignment. Prior to her appointment, a case evaluation was scheduled and concluded, which recommended an award of $4,000 in favor of plaintiffs. Defendant accepted the mediation, but plaintiffs rejected it. Plaintiffs contend the evaluation was unfair because one of the three panel members previously owned a paint store and dominated the evaluation process. Several days past the deadline to accept or reject the award, plaintiffs filed a motion to vacate the evaluation premised on this alleged impropriety. Defendant's counsel sent a copy of the motion to the panel member, who, on his own initiative

submitted an affidavit to the court regarding these allegations, which included the evaluation amount. Subsequent to the filing of this affidavit, defendant attached a copy of the affidavit to his answer and brief. Plaintiffs then filed a motion, which also disclosed the evaluation amount, seeking sanctions against defendant's counsel for revealing the award. Plaintiffs also sought the recusal of Judge Brennan based on disclosure of the case evaluation award and assertions of bias.

Judge Brennan conducted a conference call and a hearing on the motions and informed the parties that she was unaware of the amount of the case evaluation award because copies of the documents had gone to the court in Lansing rather than her regular courtroom in Brighton. Further, once aware of the concern, she purposefully did not read the pleadings in order to remain ignorant of the evaluation amount. Despite repeated reassurances that Judge Brennan did not know the evaluation amount, plaintiffs insisted on proceeding with the motion for sanctions and recusal. Both motions were denied, and plaintiffs did not pursue their motion to disqualify Judge Brennan by appealing her denial in accordance with MCR 2.003(C)(3). Plaintiffs filed a motion for clarification, which the trial court found to be frivolous and sanctioned plaintiffs in the amount of $112.50 for fees incurred by defendant in responding to that motion.

A bench trial ensued over a two-day period. At the close of plaintiffs' proofs, defendant moved for dismissal asserting the evidence did not support plaintiffs' claims. The trial court took the matter under advisement and subsequently issued a 17-page opinion and order granting the dismissal in accordance with MCR 2.504(B)(2) for failing to demonstrate that defendant's product, rather than deficiencies in performance by the contractor, was a proximate cause of plaintiffs' alleged damages. Defendant subsequently filed a motion seeking case evaluation sanctions. Plaintiffs contended sanctions were inappropriate, specifically invoking the "interest of justice" exception in MCR 2.403(O)(11). The trial court granted defendant's motion and awarded $25,275 in costs and attorney fees. The trial court also concluded that defense counsel's hourly rate of $225 was reasonable.

Plaintiffs appealed this ruling to the circuit court. Affirming the decisions of the trial court, the circuit court judge observed how unusual it was to have such an extensive record developed in a district court case, the amount of time expended in simply reviewing the file and determined that the trial judge's decision was not clearly erroneous. Plaintiffs then filed an application for leave to appeal, which this Court granted, "limited to the issues raised in the application." *Fox v Sherwin-Williams Co,* unpublished order of the Court of Appeals, entered February 12, 2009 (Docket No. 287999).

II. Analysis

Plaintiffs' complaint alleged damages for breach of implied warranty, breach of express warranty and violation of three sections of the Michigan Consumers Protection Act, MCL 445.903(1)(c), (e) and (bb). When claiming a breach of implied warranty, a product's lack of fitness for its intended purpose is deemed an actionable defect. *Kenkel v Stanley Works,* 256 Mich App 548, 557; 665 NW2d 490 (2003). In order to recover on a breach of implied warranty claim, it is incumbent on a plaintiff to prove that a defect existed in the product that was attributable to the manufacturer and that a causal connection existed between the defect and the injury or damage claimed. *Id.* at 556-557. Similarly, in order to prevail on a breach of express warranty claim, plaintiffs must demonstrate:

(1) Defendant expressly warranted the deck stain in one or more of the ways claimed by plaintiffs.

(2) Plaintiffs relied on this warranty.

(3) The stain or product was actually defective in the ways claimed by plaintiffs.

(4) Plaintiffs sustained damages.

(5) Defendant's breach of the warranty was a proximate cause of the damages sustained.

Clearly, for both causes of action, plaintiffs were required to demonstrate that defendant's product was a proximate cause of their injury. As discussed in detail by the trial court, plaintiffs' proofs fell woefully short.

In Michigan, causation is comprised of two separate elements, which are cause in fact and legal cause, i.e., proximate cause. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). "The cause in fact element generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Id.* at 163. Causation can be established through the use of circumstantial evidence, if it facilitates reasonable inferences of causation and it is not the product of mere speculation or impermissible conjecture. *Id.* at 163-164. Explaining this distinction, the *Skinner* Court stated:

> "As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence." [*Id.* at 164 (citation omitted).]

A mere possibility of causation is insufficient. Specifically:

> "The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." [*Id.* at 165 (citations omitted).]

Plaintiffs failed to demonstrate that defendant's product was a cause of their damages. Plaintiffs have merely raised an inference that the deck stain was not effective and ask the courts make a huge inferential leap regarding causation. Consistent with the trial court's explanation of its ruling, it is substantially more likely that the damages were attributable to faulty preparation or staining of the deck by the contractor and his employees or that the wood comprising the deck

had degraded sufficiently to result in the problems evidenced. There was absolutely no evidence that the deck stain was defective.

Contrary to the limitations placed on the issues to be addressed when granting leave to appeal, at oral argument before this Court, plaintiffs' raised concerns regarding the standard used by the trial court in determining whether they had proved defendant's product was a proximate cause of the injuries sustained. Specifically, plaintiffs' contend the trial court required them to prove that defendant's product was *the* proximate cause rather than merely *a* proximate cause. In reviewing the trial court's ruling, it is noted that the trial court indicated that plaintiffs' did not prove defendant's product to be "the" proximate cause but cited to "M Civ JI 25.01," which indicates "that the failure of the product to conform to the warranty must have been *a* cause of plaintiff's injury." (Emphasis added.) While the conclusion of the trial court is inartfully worded and confusing using both "a proximate cause" and "the proximate cause," I believe the trial court adhered to the definition it cited of proximate cause requiring proof of "a cause."

Further, even if the trial court used the incorrect standard, plaintiffs failed to demonstrate defendant's product was defective. Regarding plaintiffs' proofs elicited through witnesses, the trial court found the testimony of Anita Fox to not be credible. While not actually using the term "incredible" in evaluating Davis as a witness, the trial court clearly indicated substantive concerns with his testimony, stating in relevant part:

> Mr. Davis was uncomfortable with testifying. Many factors could have been the cause of his discomfort. Therefore, that is not the basis for this Court to seriously question his credibility. *Rather, it is*, in part, the fact he remembered minute details about conversations he had over 2 years ago with the Plaintiffs and employees of Sherwin Williams that were beneficial to the Plaintiff [sic]. When it came to questions by Defense Counsel, he was at best defensive, forgetful and reluctant. His answers were so confusing at times that the Court had to ask questions in an attempt to clarify issues.
>
> Mr. Davis is biased and has a very powerful person interest in seeing that this case turns out favorably for Plaintiff [sic]. He testified that he gave the Plaintiffs a 2 year warranty. Also he has performed work for the Plaintiffs both prior t and subsequent to the staining of the deck. Although not a big customer of his, they are customers. [Emphasis added.]

While plaintiffs are correct in asserting the trial court did not make a credibility determination regarding McDaniel, this is irrelevant to the issue of proximate cause. McDaniel was not qualified as an expert and the majority of his testimony was relevant only to the issue of the amount of damages or cost of repair, which was not contested.

All of plaintiffs' ancillary claims regarding representations made pertaining to the product and assurances regarding its similarity to Cuprinol are irrelevant since plaintiffs cannot establish the causal connection between use of the stain and the damages as alleged. Because plaintiffs' assertion regarding the stain being the origin or cause of the damage was completely speculative, it was insufficient for the imposition of liability on these claims. As such, the trial court properly granted defendant's request for dismissal.

Plaintiffs also contend the trial court erred in failing to apply the "interest of justice" exception of MCR 2.403(O)(11). Such argument is disingenuous at best. It is undisputed that defendant received a more favorable verdict than the case evaluation award, thereby entitling it to case evaluation sanctions pursuant to MCR 2.403(O)(1). But because the verdict resulted from the court's ruling on a motion for dismissal, the court had discretion under MCR 2.403(O)(11) to refuse to award sanctions. In *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 466-467; 702 NW2d 671 (2005), this Court discussed and elaborated on the "interest of justice" exception, stating in relevant part:

> The Court of Appeals in *Haliw* [*v Sterling Hts*, 257 Mich App 689, 705-709; 669 NW2d 563 (2003), rev'd on other grounds, 471 Mich 700 (2005)] held that the "interest of justice" exception should be invoked only in "unusual circumstances," such as where a legal issue of first impression or public interest is present, "'where the law is unsettled and substantial damages are at issue,'" where there is a significant financial disparity between the parties, or "'where the effect on third persons may be significant.'" 257 Mich App at 707, quoting *Luidens v 63rd Dist Court*, 219 Mich App 24, 36; 555 NW2d 709 (1996) (citation deleted). These factors are not exclusive. 257 Mich App at 707. "'Other circumstances, including misconduct on the part of the prevailing party, may also trigger this exception.'" *Id.* quoting *Luidens*, *supra* at 36.

Given the circumstances of this case, the trial court did not abuse its discretion in refusing to apply the "interest of justice" exception. *Harbour*, *supra* at 465. This case is clearly a simple claim for damages between two parties and there exists no overriding public interest in the outcome. Plaintiffs' suggestion that the disparity in income between the parties and the negative impact the sanctions have on their minor children as third-parties is clearly not to be seriously considered as having been contemplated as a recognizable or legitimate basis for the imposition of this exception. Based on plaintiffs' conduct in this litigation, their assertion of gamesmanship by defendant in failing to agree to their settlement offer, which was $1200 more than the case evaluation, is incredible. Such a suggestion by plaintiffs is inexplicable given plaintiffs' rejection of the case evaluation award, which was only $500 less than the amount of damages they had claimed. Further, plaintiffs' contention of misconduct by defendant regarding the laboratory report is disingenuous given that plaintiffs attached it to their own exhibit for trial.

Plaintiffs' also challenge the trial court's determination regarding the reasonableness of the attorney fees awarded. In accordance with MCR 2.403(O), a prevailing party is entitled to a reasonable attorney fee based on a reasonable hourly as determined by the trial judge for services necessitated by the rejection of the case evaluation. The following factors are to be considered when determining the reasonableness of a fee award:

> (1) the professional standing and experience of the attorney; (2) the skill, time, and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [*Wood*, *supra* at 588.]

In *Khouri*, *supra* at 531, our Supreme Court discussed the method for calculation of attorney fees as case evaluation sanctions, indicating "[t]he reasonable hourly rate represents the fee customarily charged in the locality for similar legal services, which is reflected by the market

rate for the attorney's work." Citing to federal case law the Court defined the term "market rate" to mean "the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question." *Id.* at 531, quoting *Eddleman v Switchcraft, Inc*, 965 F2d 422, 424 (CA 7, 1992). The Court further emphasized "that 'the burden is on the fee applicant to produce satisfactory evidence-in addition to the attorney's own affidavits-that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.'" *Id., quoting Blum v Stenson*, 465 US 886, 895 n 11; 104 S Ct 1541; 79 L Ed 2d 891 (1984). In determining the fees routinely "charged in the locality for similar legal services can be established by testimony or empirical data found in surveys and other reliable reports." *Id.* at 531-532.

Plaintiffs argued that in determining a reasonable attorney fee the trial court is restricted to considering only fees routinely charged in the Lansing/Ingham County area and presented a survey indicating such fees were below the requested amount for an attorney equivalent in experience to defendant's counsel. Plaintiffs also challenged the practice of minimal quarter-hour billing used by defendant's counsel and asserted that routine practice in the area required the use of tenth-of-an-hour minimums. In determining that the rate of $225 an hour was reasonable, the trial court considered the relevant factors as set forth in *Wood* and found that "Ingham County rates are in line with what defense counsel seeks to have me order." In support of this conclusion, the trial court cited the rates charged by local attorneys in plaintiffs' firm, the affidavit provided by a local attorney on behalf of defendant and her own previous experience as a litigator in the area. Referencing the survey provided by plaintiffs in support of their contention that $225 was unreasonable for the locality, the trial court noted that the amount "is still [in] the seventy-fifth percentile . . . . So, I'm not convinced that their survey that they provided actually contradicts what the [defendant] is requesting." In addition, the trial court noted that the survey provided by plaintiffs in support of their position dealt with sole practitioners or sole practitioners with associates or sharing space, which is not similar to the practice situation of defendant's counsel. With reference to the contention that quarter-hour billing was unreasonable, the trial court noted other large firms in the locality used the same methodology, even if they were not in the majority. The trial court clearly delineated its consideration of the appropriate factors in its determination to award sanctions and in finding the fees sought by defendant's counsel to be reasonable. Based on the history of this litigation, plaintiffs cannot demonstrate that the trial court's rulings on this issue constituted an abuse of discretion.

With regard to their contention that the trial court erred in refusing to vacate the case evaluation, plaintiffs fail, on appeal, to expound on or cite any supporting legal authority. As such, the issue should be deemed waived. "A party may not state their position and then leave it to this Court to search for authority in support of that position." *Badiee v Brighton Area Schools,* 265 Mich App 343, 379; 695 NW2d 521 (2005), citing *Conlin v Scio Twp,* 262 Mich App 379, 384; 686 NW2d 16 (2004).

/s/ Michael J. Talbot